Supreme Court, U.S.
FILED
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No. 85-1355

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL FLEMING and ANASTASIA FLEMING,

Petitioners,

– against –

ALLSTATE INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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25pp

QUESTIONS PRESENTED

1. Did the Court of Appeals of the State of New York decision deny petitioners their right to trial by jury as provided in the Seventh Amendment? Yes.

2. Did the Court of Appeals decision deny petitioners their rights of equal protection and due process according to the Fifth and Fourteenth Amendments? Yes.

3. Did the Court of Appeals abridge petitioners rights contract in accordance with Article I, Section 10 U.S. Constitution? Yes.

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– against –

ALLSTATE INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Michael Fleming and Anastasia Fleming petition for a writ of certiorari to review the judgment of the New York State Court of Appeals in this case.

PRELIMINARY STATEMENT

The rule in this case, that an insurance company can never be held liable for punitive damages no matter how outrageous its conduct should not be allowed to stand.

OPINIONS BELOW

The order of the New York State Court of Appeals, dated November 14, 1985, (App. A, infra, A-1) is reported at ____ N.Y. 2d ____. It affirms the order of the Appellate Division of the State of New York, Second Judicial Department (App. B, infra B-1) which is reported at 106 Ad2d 426, which reverses in part the order of Supreme Court, Special Term Part I (App. C, infra C-1). This finding was confirmed by a second order by Supreme Court, Special Term Part I (App. D, infra D-1) when defendant made a second motion to dismiss petitioner's claim.

JURISDICTION

The judgment of the New York State Court of Appeals (App. A, infra A-1) was entered on November 14, 1985. The jurisdiction of this Court is invoked under Title 28 of the United State Code, Section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No. State . . . shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty and property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 10 of the United States Constitution provides in relevant part:

> No State shall impair the obligations of contracts.

The Seventh Amendment to the United States Constitution provides in relevant part:

> In suits at common law . . . the right of trial by jury shall be preserved.

STATEMENT OF THE CASE

Anastasia Fleming, a suburban mother of seven children purchased a car to perform her daily chores and an automobile liability insurance policy from Allstate Insurance Company, a multi-billion dollar corporation. Her son, Michael Fleming, who at the time was a high school student and the holder of a junior license, who occasionally drove his mother's car was included in the policy's coverage.

With no evidence to support its determination, Allstate decided that Michael Fleming was the principal operator of the car and demanded an additional premium. The Flemings protested the additional charge through their broker who informed Allstate that Michael Fleming was not the principal operator many times and supplied Allstate with documentation to prove that he was enrolled in a school which required him to ride a special bus to and from classes and which had a rule that prohibited students from driving to school.

Allstate admits that it was told Michael Fleming was not the principal operator and that it received the documentation but it refused to correct its error and ultimately attempted to cancel the policy.

Shortly after the attempted cancellation, Michael Fleming had an accident while driving his mother's car. The Flemings immediately notified Allstate, which disclaimed. The Flemings were sued by the injured driver of the other car and by the owner of the car's insurance company, which had paid the owner for damages to the car. The injured driver apparently abandoned his suit on learning of Allstate's disclaimer and it appears that he was not compensated. The car owner's insurance company entered a default judgment against the Flemings. The Flemings had been led to believe that Allstate was going to settle the matter with the other insurance company.

The Flemings then sued to have the default judgment vacated and then brought a declaratory judgment action against Allstate. The Court found that the cancellation of the insurance policy

was null and void because the notice of cancellation was defective in form and because Allstate failed to prove it mailed the notice of cancellation because the affidavit of mailing, sworn to by the mail clerk contained an untruth. The mail clerk swore on April 8 that he mailed the notice on April 12 and the record of mailing was stamped with a postal stamp dated April 13.

The Flemings then sued Allstate to recover the expenses incurred as a result of the litigation that had been brought against them and punitive damages. Actual damages have been awarded, but the claim for punitive damages was dismissed.

Allstate, a member of the multi billion Sears Financial Network was forced to pay out only about $5,000, which included the damages to the other car and the Fleming's expenses from the litigation brought against them by third-parties. Allstate paid no damages to the injured driver of the other car. Its bad faith decision to disclaim was therefore very profitable since not only was the amount it was forced to pay out below the policy limits, it accrued interest because of the long delay in paying the amount of damages it owed to the owner of the other car.

Allstate maintained throughout both actions that its attempted cancellation and refusal to indemnify and defend was justified because its records indicated that Michael Fleming was the principal driver. Allstate never produced any records that supported that contention. Allstate has in fact admitted that it has only one such record—a memo stating that in a direct interview, Anastasia Fleming said that Michael Fleming was the principal driver, driving it to school. The memo was written about one year after the attempted cancellation when Allstate was on notice an accident had occurred and was in possession of documentation indicating the falsity of that statement.

The Supreme Court, Suffolk County twice sustained the Flemings' claim for punitive damages, leaving it as an issue to be determined by a jury. The Appellate Division Second Department dismissed the claim for punitive damages and emotional distress finding that even if the breach was willful and without justification and perjury, forgery, falsification of business records were

committed in the breach, and the breach was part of a calculated conspiracy to avoid incurring the expense of giving insurance coverage to those to whom the insurer owes the utmost good faith, an insurance company is not liable for punitive damages. The New York State Court of Appeals affirmed in a brief decision which fails to reflect its reasoning on an issue in which the Appellate Divisions of New York State were split and on which the U.S. District Court for the Southern District of New York has followed the opinion of the Appellate Division Third Department that punitive damages are available in breach of contract cases. *Banco Nacional De Costa Rica v. Bremer Holdings*, 494 F. Supp. 364 at 373 (SDNY 1980). *Juster v. Rothschild Unterboerg Towbin, Gruntal & Co*, 554 F. Supp. 31 (1983).

REASONS FOR GRANTING THE WRIT

Petitioners submit (1) that in this case the Court of Appeals of the State of New York has decided federal questions of great substance not heretofore specifically determined by this Court, although a similar case *Aetna Life Ins. Co. v. Lavoie*, 470 So. 2d 1060 (Ala. 1984) is currently before this Court, or, in the alternative, (2) that the Court of Appeals has decided those questions in a way which is not in accord with applicable decisions of this Court and in a way that is contrary to the United States Constitution, and (3) that the decision of the Court of Appeals is not in conformity with the Federal District Courts for New York or the Federal Appellate Courts.

I

In the case, *Aetna Life Ins. Co. v. Lavoie*, supra., which is currently before this Court, an insurance company is contesting the constitutionality of punitive damages in an appeal from an Alabama decision upholding a multi-million dollar judgment against the insurer.

In this case, the petitioners are contesting the constitutionality of the denial of punitive damages on the grounds that this denial abridges their rights to trial by jury, equal protection and due process of law and rights of contract under the Constitution.

II

THE COURT OF APPEALS DECISION DENIES PETITIONERS THE RIGHT TO A TRIAL BY JURY IN A CIVIL CASE AS PROVIDED BY THE SEVENTH AMENDMENT TO THE U.S. CONSTITUTION

New York law provides that punitive damages are available in breach of contract suits when it can be proved that the company in its dealing with the general public has engaged in a fraudulent scheme evincing such a high degree of moral turpitude and such wanton dishonesty as to imply a criminal indifference to civil obligations. *Walker v. Sheldon*, 10 N.Y. 2d 401,405. *Halpin v. Prudential Insurance Co. of America*, 48 N.Y. 2d, 906, 425 N.Y.S. 2d 48.

The Flemings alleged that Allstate's conduct was morally culpable and fit the standard set by New York State law since it consisted of forgery, falsification of business records, slander, perjury, fraud, etc.; that a public right was involved since third party interests were effected and since New York requires all motorists to be insured to protect innocent, injured victims of accidents as a matter of public policy; that Allstate's actions were part of its general course of business conduct and similar to actions for which they were found liable for punitive damages in other states; and that these were not a single act, but began with the charge for an extra premium, continued for several years and included the actions of refusing to investigate and correct its error, attempting to cancel the policy, committing perjury on the affidavit of mailing, forging a business record to justify an unjustified attempted cancellation, refusing to defend and indemnify, allowing a default judgment to be entered against its insureds, defending the declaratory action on the grounds that its notice of cancellation was not defective, when similar notices of cancellation had been judicially determined to be defective in a suit to which Allstate was a part, etc. And this conduct still continues. Allstate, through its attorneys, directly contacted the Flemings and threatened them with legal action if they refused to satisfy the judgment against Allstate for litigation expenses – an

attempt to void appellate jurisdiction. A dark shadow of fraud and conspiracy has enveloped each and every aspect of Allstate's actions regarding the handling of the Flemings' insurance and continues still.

The actions complained of are part of the general business practices of Allstate and the Sears Financial Network. Other states have found Allstate liable for refusal to investigate properly, falsification of business records to avoid paying legitimate claims and to make it appear that insureds who are merely asserting their rights to coverage are committing a fraud against the insurance company. In addition Allstate has been sued under RICO, the State of Maine found that Sears business practices are contrary to the laws of the State of Maine and Sears business practices are currently under investigation in Nassau County, New York.

A jury could have reasonably determined that the conduct complained of fit the standard set by New York case law for punitive damages.

By its decision, the New York Court of Appeals has determined that no factual allegations made against an insurance company will ever reach the standard set for punitive damages whether the complaint is for breach of contract or for fraud or other conduct that is essentially tortious in nature. It has in fact promulgated a new rule: No insurance company can ever be held liable for punitive damages no matter how outrageous its conduct.

The decision, in effect, denies the right of any civil plaintiff to have a jury determine whether the conduct complained of merits punitive damages.

The lower court would have allowed the claim for punitive damages to be determined by a jury. The Flemings requested jury determination in their appeals. The matter has therefore been preserved for review herein.

III

THE COURT OF APPEALS DECISION ABRIDGES PETITIONERS' RIGHTS TO EQUAL PROTECTION AND DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND ARE NOT IN ACCORD WITH DECISIONS OF THIS COURT

Punitive damages are obtainable in tort cases under New York law. The conduct complained of in this case, fraud, forgery, perjury, slander, etc., is essentially tortious conduct. The Court of Appeals decision holds, that even though a plaintiff is the victim of tortious conduct, if that tortious conduct occurred in a breach of contract situation, the plaintiff cannot recover punitive damages even if he attempts to frame his complaint in tort. This is an unreasonable discrimination against certain victims of tortious conduct – those who experience it in breach of contract situations. Plaintiffs who are victimized by tortious conduct in breach of contract situations are therefore denied due process and equal protection of the law.

The Equal Protection Clause forbids "disparity of treatment by a state between classes of individuals whose situation are arguably indistinguishable." *Ross v. Moffitt*, 417 U.S. 608, 609.

A victim of perjury, forgery, etc., in a breach of contract is as much of a victim of tortious conduct as one who experiences them in a non-contractual situation. Denying punitive damages in breach of contract cases discriminates against a certain class of victims of tortious conduct. It is disparate treatment which is a denial of equal protection. *Yale Auto Parts, Inc., v. Johnson*, 758 F. 2d 54, 61 (2d Cir. 1985).

IV

THE COURT OF APPEALS DECISION ABRIDGES PETITIONERS' RIGHTS UNDER THE CONTRACT CLAUSE OF THE CONSTITUTION AND IS NOT IN ACCORD WITH DECISIONS OF THIS COURT

No state can alleviate the commitments of one party to a contract or make enforcement of the contract unreasonably difficult.

An insured has a right to expect that an insurance company will act in the utmost good faith and fulfill its fiduciary duties towards him. Punitive damages enable an insured to enforce these rights against an insurance company.

The denial of a claim for punitive damages despite a showing of moral culpability, public right, usual course of business conduct, etc, as in this case, leaves the insurer insulated while injuring the insured and destroying the injured. It destroys any compelling reason for the insurer to honor a claim, even where the claim's validity is clear to the insurer.

The insured pays his premiums to guard against the financial percussion of events, in this case, damages stemming from an automobile accident. He may find, as the petitioners did, the insurer using the precarious financial position he sought to guard against to deter him from enforcing his rights and those of innocent third parties against the insurer. The insurer need only determine whether litigation costs to be incurred will justify the savings from refusing to pay the claim. In the event the insured pursues his claim to judgment, as the petitioners have, the insurer may still profit, as Allstate has, so long as the sum of pre-judgment interest plus litigation costs is less than the profit from retained capital. The law as proclaimed by the Court of Appeals not only permits, but actually encourages such bad faith refusals as the petitioners have experienced. A remedy for the insured who has had his claim refused in bad faith is necessary. Compelling the insured to incur legal expenses and await his recovery ignores the basic purpose of insurance: to provide immediate financial relief upon the occurrence of the accident. There must be some

safeguard promulgated to prevent abuse of the clearly inequitable bargaining position inherent to the insured/insurer relationship which can be manipulated to force an unconscionable alteration of the insurer's obligations after the insured's full performance, and to force it to fulfill its contractual obligations. Punitive damages for bad faith refusal provides the necessary remedy and acts as an equalizing force without penalizing the insurer's right to a good faith investigation and protects contractual rights.

The Court of Appeals decision not only allows an insurer to breach a contract but allows it to commit fraud, perjury, forgery, etc. in doing so. It completely alleviates the insurer of its contractual commitments.

This Court has allowed states to impair contractual rights only to protect a basic societal interest and the law is a narrow means of protecting that interest. *United States Trust Co., v. New Jersey*, 431 U.S. 1. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234. The New York State legislature enacted a Motor Vehicle Security Act because of concern over the rising toll of motor vehicle accidents and the suffering and loss thereby inflicted. The legislature determined that it is a matter of grave concern that motorists shall be recompensed for the injury and financial loss inflicted upon them. To carry out this purpose owners of motor vehicles are required to maintain proof of financial security through liability insurance.

Therefore, under New York law, motorists are required to purchase automobile liability insurance, but the insurance companies are free to break the insurance contract in bad faith and even commit fraud, perjury, forgery and other morally culpable conduct in the breach. The insureds have obligations under the contract, but the insurer, in effect, has none. Bad faith refusal to pay legitimate claims arising from automobile accidents would be prevented by punitive damages.

The Court of Appeals decision to bar punitive damages in such cases does not protect the societal interest which the State Legislature seeks to prevent, it hinders it. It protects the profit interest of the insurance companies at the expense of the contractual rights of the insureds and the expense of public interest.

V

THE DECISION OF THE COURT OF APPEALS FAILS TO UPHOLD FEDERAL LAW AND IS NOT IN ACCORD WITH DECISION OF THE FEDERAL DISTRICT COURTS OF NEW YORK OR WITH THOSE OF FEDERAL APPELLATE COURTS

The Federal Courts recognize exceptions to the rule against punitive damages in contract actions and have declined to follow the New York rule. *Willis v. Shearson/American Express, Inc.*, 569 F Supp., 821.

In *Willoughby Roofing & Supply Co., Inc. v. Kajima International, Inc.*, 598 F Supp., 353, affd. 776 F 2d 269 (11th Circuit)., it was held that punitive damages were available in a breach of contract case when wilfull fraud had been committed.

"Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof." *Robb v. Connolly,* 111 U.S. 624,637. *Sumner v. Mata,* 449 U.S. 539, 549. *Allen v. McCurry*, 449 U.S. 90, 105.

The Court of Appeals decision recognizes no exception to the rule against punitive damages in breach of contract actions and permits fraud and other morally culpable conduct in a breach of contract.

Since federal laws do not permit fraud, forgery, etc., in breach of contract actions and since the denial of punitive damages abridges constitutional rights, the decision breaches a state's obligation to guard, enforce and protect every right granted or secured by the Constitution and the laws made in pursuance thereof.

THE PUBLIC IMPORTANCE OF THE ISSUES PRESENTED

The decision of the Court of Appeals denying punitive damages in breach of contract cases even when fraud, perjury, forgery, falsification of business records and other morally culpable conduct have been committed contradicts the finds of Federal Courts

and of Courts in other states. It denies equal protection and due process of law and impairs contractual rights of insureds, who would not be denied these rights if they lived in other states.

The issue of the constitutionality of punitive damages is already before this Court in *Aetna Life Ins. Co. v. Lavoie*, supra., which seeks to have punitive damages against insurance companies declared unconstitutional. This case is the mirror image of the *Aetna* case. It seeks to have the denial of punitive damages against insurance companies declared unconstitutional and should be considered with the *Aetna* case and any other similar cases.

CONCLUSION

For the foregoing reasons the petition for Writ of Certiorari should be granted in all respects.

Respectfully submitted,

EDWARD J. REGAN
Attorney for Petitioners
3 Timbercrest Lane
So. Setauket, New York 11720

Dated: So. Setauket, New York
February 6, 1986

APPENDIX

APPENDIX A

Order of Court of Appeals — State of New York

The Hon. Sol Wachtler, Chief Judge, Presiding

5601d No. 696

Michael Fleming et al.,

Appellants,

v.

Allstate Insurance Company,

Respondent.

Index No. 83/14226

The appellant(s) in the above entitled appeal appeared by Edward J. Regan, Esq. and Marylou B. Regan, Esq.; *the respondent appeared by* Rivkin, Radler, Dunne & Bayh, Esqs.

The Court, after due deliberation, orders and adjudges that on review of submissions pursuant to section 500.4 of the Rules, judgment appealed from and order of the Appellate Division brought up for review affirmed, with costs, for the reasons stated in the memorandum at the Appellate Division (106 AD2d 426). No basis is shown for amendment of the complaint to state a claim for punitive damages (see, *Queenbury U.F.S.D. v. Jim Walter Corp.*, 101 AD2d 992, 993, affd 64 NY2d 964). Chief Judge Wachtler and Judges Jasen, Meyer, Simons, Kaye, Alexander and Titone concur.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, Suffolk County, *there to be proceeded upon according to law.*

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, November 14, 1985

APPENDIX B

Appellate Division — First Department Decision

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 10, 1984

HON. GUY J. MANGANO, Justice Presiding,
HON. DAVID T. GIBBONS,
HON. FRANK D. O'CONNOR,
HON. RICHARD A. BROWN. *Associate Justices*

Michael Fleming, et al.,

Respondents-Appellants,

v.

Allstate Insurance Company,

Appellant-Respondent.

Order

In the above entitled action to recover damages based upon a breach of an insurance contract, the above named Allstate Insurance Company, defendant, having appealed to this court from an order of the Supreme Court, Suffolk County, dated August 22, 1983, which denied its motion to dismiss the complaint; (Plaintiffs; cross appeal from said order had been abandoned); and the said appeal having been argued by Nancy K. Eisner, Esq., of counsel for appellant-respondent and argued by Edward J. Regan, Esq., of counsel for respondents-appellants, due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the order appealed from is hereby modified, on the law, by adding thereto a provision granting defendant's motion to dismiss the complaint solely with respect to plaintiffs' requests for (1) compensatory damages for emotional distress and (2) punitive damages, and, as so modified, said order unanimously affirmed, without costs or disbursements.

Enter

SUPREME COURT, STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPT.

I, IRVING N. SELKIN, Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, do hereby certify that I have compared this copy with the original filed in this office on December 10, 1984 and that this copy is a correct description of the original.

IN WITNESS WHEREOF I have hereunto put my hand and affixed the seal of this Court on December 31, 1984.

Clerk of the Appellate Division

GUY J. MANGANO, J.P.
DAVID T. GIBBONS
FRANK D. O'CONNOR
RICHRD A. BROWN, JJ.

____ AD2d ____ A - October 22, 1984

2404 E

Michael Fleming, et al.,

Respondents-Appellants,

v.

Allstate Insurance Company,

Appellant-Respondent.

Rivkin, Leff, Sherman & Radler, Garden City, N.Y. (Nancy K. Eisner and Frank L. Amoroso of counsel), for appellant-respondent.

Regan & Regan, South Setauket, N.Y. (Edward J. Regan of counsel), for respondents-appellants.

In an action to recover damages based upon a breach of an insurance contract, defendant appeals from an order of the Supreme Court, Suffolk County (MALLON, J.), dated August 22, 1983, which denied its motion to dismiss the complaint. (Plaintiffs' cross appeal from said order has been abandoned.)

Order modified, on the law, by adding thereto a provision granting defendant's motion to dismiss the complaint solely with respect to plaintiffs' requests for (1) compensatory damages for emotional distress and (2) punitive damages. As so modified, order affirmed without costs or disbursements.

Upon a motion to dismiss a complaint, a plaintiff must be given the benefit of every possible favorable inference (see *Rovello v. Orofino Realty Co.*, 40 NY2d 633, 634) and the complaint should not be dismissed if "upon examination of the four corners of the pleading * * * the factual allegations contained therein indicate the existence of a cause of action" (*Melito v Interboro-Mutual Ind. Ins. Co.*, 73 AD2d 819, 820; see, also, *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275; *Reifenstein v Allstate Ins. Co.*, 92 Ad2d 715). So viewed, we hold that the instant complaint alleges a cause of action for breach of contract, and, if plaintiffs ultimately prevail, they may recover consequential damages resulting from said breach.

However, plaintiffs' requests for (1) damages for emotional distress and (2) punitive damages, must be stricken from the complaint. It is beyond cavil that a plaintiff cannot, in an action for breach of contract, recover damages for emotional distress (*Wehringer v Standard Security Life Ins. Co. of N.Y.*, 57 NY2d 757). With respect to the issue of punitive damages, it has been consistently held that plaintiffs may not recover such damages without submitting factual allegations that defendant, in its dealings with the general public, engaged in a fraudulent scheme which demonstrates "such wanton dishonesty as to imply a criminal indifference to civil obligations" (*Walker v Sheldon*, 10 NY2d 401, 405; *Granato v Allstate Ins. Co.*, 70 AD2d 948, 949, mot for lv to app den 48 NY2d 610; see, also, *Reifenstein v Allstate Ins. Co.*, 92 AD2d 715, *supra; Royal Globe Ins. Co. v. Chock Full O'Nuts Corp.*, 86 AD2d 315, 318-319). "Allegations of breach of an insurance contract, even a breach committed willfully and without justification, are insufficient to authorize recovery of punitive damages" (*Catalogue Serv. of Westchester v Insurance Co. of North Amer.*, 74 AD2d 837, 838; see, also, *Reifenstein v Allstate Ins. Co., supra, Kulak v Nationwide Mut. Ins. Co.*, 47 AD2d 418, 421 revd on other grounds 40 NY2d 140). Viewed from this perspective, the plaintiffs' allegations are insufficient to justify an award of punitive damages. Accordingly, the order appealed from must be modified to the extent indicated.

We have reviewed defendant's remaining contentions, i.e., that the instant action is barred by virture of (1) an earlier declaratory

judgment action between the parties and (2) the Statute of Limitations, and find them to be without merit (*Johnson v General Mut. Ins. Co.*, 24 NY2d 42, 51; *Teeter v Allstate Ins. Co.*, 9 AD2d 176, 185; *Colpan Realty Corp. v Great Amer. Ins. Co.*, 83 Misc2d 730; *Boyd Bros. Trans. Co. v Fireman's Fund Ins. Cos.* 540 F Supp 579, 582, affd 729 F2d 1407).

APPENDIX C

Order Dated August 22, 1983.

Supreme Court-State of New York
Suffolk County
Special Term, Part I

PRESENT: HON. THOMAS V. MALLON, Justice.

MICHAEL FLEMING and ANASTASIA FLEMING,

Plaintiffs,

– against –

ALLSTATE INSURANCE COMPANY,

Defendant.

Index No. 14226, 1983

Motion Date 8/15 1983

Motion No. 7, 486

Plaintiffs Attorney, EDWARD J. & MARYLOU B. REGAN, ESQS. 3 Timbercrest Lane, So. Setauket, N.Y. 11720.

Defendants Attorney, RIVKIN, LEFF, SHERMAN & RADLER, ESQS. 100 Garden City Plaza, Garden City, New York 11530.

Upon the following papers numbered 1 to 43 read on this motion to dismiss complaint.

Notice of Motion/and supporting papers 1-5; 6; Answering Affidavits and supporting papers 7-34; Replying Affidavits and supporting papers 35-37; Other 37-43; (and after hearing counsel in support of and opposed to the motion) it is,

ORDERED that this motion of defendant for an order pursuant to CPLR 3211 (a) (7) dismissing the complaint, is decided as follows:

Defendant issued an automobile liability policy to plaintiff, Anastasia Fleming for a period from August 31, 1976 to August 31, 1977. On April 29, 1977, Allstate purported to cancel the policy as being lapsed for failure to pay premiums. On June 8, 1977, plaintiff, Michael Fleming, while operating his mother's (Anastasia's) car, was involved in an accident.

Plaintiffs notified defendant of the accident but were informed that there was no coverage. Plaintiff's broker wrote Allstate asking for a reconsideration but no response was forthcoming.

Hartford Accident and Indemnity Company, the insurer and subrogee of the party whose car had been damaged in the aforementioned collision, sued plaintiffs' in December, 1979, and an inquest resulting in a default judgment was entered in May, 1980. By reason of the judgment plaintiff's license and the car registration was suspended.

The default judgment was vacated by order of this Court on January 20, 1981. A declaratory judgment action was then brought by plaintiffs against Allstate and, on a motion for summary judgment therein, this Court, by decision of June 30, 1982, and judgment entered February 28, 1983, granted the motion, declared the attempted cancellation as improper, directed Allstate to defend plaintiffs in the action brought by Hartford, and required defendant to indemnify plaintiffs for any judgment against them. Thereafter, Allstate negotiated a settlement of Hartford's subrogation claim within the policy limits.

Plaintiffs have now brought suit against Allstate for $10,000,000.00 and punitive damages in the sum of $50,000,000.00 alleging wrongful cancellation of the policy and wrongful refusal to indemnify and defend, and they charge that such conduct was a breach of the covenant of good faith and fair dealing implied in the insurance contract, and constituted a conscious disregard of plaintiff's rights, resulting in financial, physical and emotional suffering.

Defendant has moved to dismiss the complaint alluding to a failure to state a cause of action for compensatory or punitive damages and citing that there is no allegation of direct loss as a result of the judgment taken again plaintiffs, the judgment having been vacated, and the claim having been settled upon defendant's payment; and that no morally culpable conduct on defendant's part is alleged, or that the cancellation was part of an overall general scheme against the public at large. A further ground is that of the Statute of Limitations since the present suit was commenced over six years after the attempted cancellation.

Plaintiffs, by their attorney's affirmations in opposition to this motion enlarge in the allegations of the complaint, contending that the hereinafter enumerated acts by defendant constituted bad faith, were outrageous, immoral and malicious and were part of a scheme in its dealings with the general public to engage in fraudulent activity; the latter reaching a level of wanton dishonesty equivalent to a criminal indifference to civil obligations.

The specific acts complained of are:

1) The cancellation of the policy on improper grounds, to wit: unjustifiably increasing the insurance premium for the reason that the insured's son was the principal user of the car, which was untrue;

2) The abortive attempt at cancellation, the Court having subsequently found that the defendant's office records revealed mailing on the 12th of April, but the affidavit as to mailing having been sworn to on the 8th of April and the improper form of a notice of cancellation, the Court having determined that attention was not drawn to statutorily required language in print of sufficient size;

3) Failure to defend plaintiffs in the suit brought by Hartford, even though defendant had reason to know, from Court decisions, that its cancellation notice was improper.

Defendant's refusal to indemnify plaintiffs when the judgment was entered against them by Hartford.

This Court does not feel the need for further exploration of the arguments of the parties, since, on this motion the only question is whether a cause of action is stated. The answer to that is that one is detected in the complaint, to wit, allegations of breach of contract.

By prior order, it has been established as between the parties, that the insurance contract was not effectively canceled, and it then follows that Allstate should have defended its insured. The question of damages is something else again, to be confronted upon the trial or on a motion for summary judgment (which this present motion is not). The Statute of Limitations is not considered as a ground for dismissal since actions or omissions of the defendant continued within the six year period for commencement of suit from the time of the attempted cancellation.

In considering the legal sufficiency of the allegations of a complaint, plaintiff must be given the benefit of every possible favorable inference and, the complaint should not be dismissed, if upon examination of the four corners of the pleading the factual allegations contained therein indicate the existence of a cause of action: So reads; *Reifenstein v. Allstate Insurance Co.*, A.D. 2d , 461 N.Y.S. 2d 104.

In *State v. Schenectady Chemicals, Inc.*, Misc. 2d 459 N.Y.S. 2d 971: Unless a motion to dismiss for failure to state a cause of action is converted to one for summary judgment, the Court's inquiry is limited to the allegations of the complaint as strengthened by any affidavit offered to preserve it.

Again, from *Gabrielle v. Craft*, 73 A.D. 2d 939, 428 N.Y.S.2d 84, on a motion to dismiss for failure to state a cause of action, the question is whether a cause of action has been stated, not whether the cause of action can be proved.

Of pertinence here too, is that there is no separate cause of action for punitive damages. *Anderson v. WHEC-TV,* A.D.2d 461 N.Y.S.2d 607.

Even if the Court were inclined to dismiss so much of the complaint as relates to primitive damages, the motion here made, which is addressed to the complaint as a whole, cannot succeed. Thus: *Country-Wide Leasing Corp. v. Suburu Distributors Corp.*, 85 A.D.2d 592, 444 N.Y.S.2d 710.

The motion to dismiss the complaint is denied.

DATED: August 22, 1983.

S/ Thomas Mallon

J.S.C.

APPENDIX D

Memorandum Decision of Judge Gerard

Supreme Court, Suffolk County

MICHAEL FLEMING and ANASTASIA FLEMING,

Plaintiffs,

vs.

ALLSTATE INSURANCE COMPANY,

Defendant.

SPECIAL TERM, PART I

By GERARD, J.S.C.

Dated October 16th 1984

Index #: 83-14226

Motion Date: July 6, 1984

Motion #: 5,086

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Motion and cross-motion are decided to the following extent:

The complaint basically seeks compensatory and punitive damages for an alleged breach of an insurance contract. In its answer, the defendant denies the allegations in the complaint and sets forth four affirmative defenses.

The plaintiff, Anastasia Fleming, the owner of a 1970 International automobile, purchased a liability insurance policy #0931181832 from the Allstate Insurance Company to be in force and effect from August 31, 1976 to August 31, 1977. Under the terms of the policy, plaintiff, Michael Fleming, was included in the policy's coverage as a holder of a junior license. However, on or about October 18, 1976, the defendant claimed that Michael Fleming was the principal operator of the vehicle and demanded an additional premium. The plaintiffs questioned this determination and attempted to rectify the dispute through the insurance broker from whom Anastasia Fleming purchased the policy. The dispute was not resolved, and the defendant Allstate issued a notice of cancellation on or about April 29, 1977 due to the plaintiffs' failure to pay the additional premium.

Thereafter, on June 8, 1977, plaintiff Michael Fleming was involved in an automobile accident that resulted in the commencement of a lawsuit by Hartford Accident & Idemnity Co. for monies paid by it to the owner of the other vehicle for property damage. Upon notification of the institution of legal proceedings the defendant Allstate refused to defend and indemnify the plaintiffs based upon the cancellation of the policy in April of 1977. On August 18, 1980, the Hartford Accident & Indemnity Co. obtained a default judgment against the plaintiffs in the sum of Three Thousand Seven Hundred Sixteen Dollars and Eleven Cents ($3,716.11). The judgment was vacated on January 20, 1980 (Gowan, J.) and a declaratory judgment action was initiated to determine the rights of the plaintiffs under the aforementioned insurance policy. By decision of Justice Catherine England dated November 3, 1982 (judgment signed by Mr. Justice Cromarty on February 28, 1983), the Court found that the defendant Allstate had improperly cancelled the insurance policy and directed it to defend and indemnify the plaintiffs in the pending lawsuit with the Hartford Accident & Indemnity Company. It appears that shortly thereafter the subrogation claim was settled by the defendant with Hartford Accident & Indemnity Company and no judgment of record exists against the plaintiffs at this time.

In this application, the defendant seeks to have the Court dismiss that part of the plaintiffs' complaint which requests punitive damages pursuant to CPLR 3211(a)(7). In a prior motion, the defendant sought to have the entire complaint dismissed for failure to state a cause of action. By decision dated August 22, 1983, Mr. Justice Mallon denied the motion, specifically finding that the complaint stated a cause of action. Initially, the Court would note that there is no separate cause of action for punitive damages (see, *Anderson v. WHEC-TV*, 92 A.D.2d 747, 461 N.Y.S.2d 607 (4th Dept., 1983), since they are an incident of ordinary damages (*see Liffman v. Brooke*, 59 A.D.2d 687, 390 N.E.2d 674). That fact alone would be sufficient to sustain the denial of the motion; however, the Court will not grant the motion on the further grounds that the application has previously been decided by Judge Mallon and that the motion is in violation of the single-motion rule of CPLR 3211(e).

The plaintiffs have cross-moved for an order of this Court dismissing the defendant's affirmative defenses and answer and granting them summary judgment. The defendant in its answer sets forth four affirmative defenses to wit: (1) the complaint fails to state a cause of action; (2) plaintiffs knowingly and wilfully operated or allowed the operation of a motor vehicle after the contract of insurance covering such motor vehicle was cancelled thus contributing to their alleged damages; (3) the complaint is barred by the six-year statute of limitations set forth in CPLR 213, and (4) action is barred by the doctrine of res judicata.

The first and third affirmative defenses are dismissed based upon the decision of Mr. Justice Mallon who specifically ruled that the complaint stated a cause of action and was not barred by the applicable statute of limitations. The Court will also dismiss the second and fourth affirmative defenses. The decision of Justice England in the declaratory judgment action ruling that the defendant Allstate had improperly cancelled the subject insurance policy, renders the second affirmative defense moot. As to the defense of res judicata; the papers are devoid of any facts to support the assertion that the plaintiffs sued the defendant in a prior action arising out of the same facts and

failied to allege any damages. The declaratory judgment action was instituted to determine if the defendant had properly and effectively cancelled the policy and was not, as herein, an action for breach of contract, and therefore, the doctrine of res judicata does not apply.

As to the application of the plaintiffs to strike the remaining parts of the answer, the Court is satisfied that there are issues of fact raised in the papers herein which would bar the granting of summary judgment prior to trial. *Fantasia v. Carpenters Finger Lakes District Counsel Welfare Fund*, 73 A.D.2d 799, 423 N.Y.S.2d 722; *Friends of Animals Inc. v. Association Fur Manufacturers Inc.*, 61 A.D.2d 141, 401 N.Y.S.2d 78 reversed on other grounds, 46 N.Y.2d 1065, 416 N.Y.S.2d 790, 390 N.E. 2d 298. Summary judgment is a drastic remedy which should be withheld whenever there is any doubt as to the existence of a triable or arguable issue of fact. *Norden Restaurant Corp. v. The Sons of the Revolution*, 73 A.D.2d 213, 425 N.Y.S.2d 810 reversed on other grounds, 51 N.Y.2d 518, 434 N.Y.S.2d 967, 415 N.E.2d 956; *Gugliano v. Basirico*, 33 A.D.2d 1045, 308 N.Y.S.2d 815; *Theodore v. Hartford Accident & Indemnity Company*, 60 Misc. 2d 991, 304 N.Y.S.2d 688.

Submit judgment on notice.

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J.S.C.